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No. 88-521

In the Supreme Court of the United States

OCTOBER TERM, 1988

HARRY JESSUP AND WESTMORELAND RECREATION SOCIETY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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9 pp

QUESTION PRESENTED

Whether a pro se litigant's notice of appeal, filed in his name only, was sufficient under Fed. R. App. P. 3(c) to include as a party to the appeal a corporation that he controlled.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1988. The petition for a writ of certiorari was filed on September 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 17, 1985, Ernest Rockwell pleaded guilty to one count of tax evasion and one count of engaging in a

continuing criminal narcotics enterprise (Pet. App. A4-A5). As part of the plea agreement Rockwell forfeited any interest in property obtained with the proceeds of his drug trafficking activities, including all right, title, and interest in Indian Lake Park, a mountain site in Westmoreland County, Pennsylvania (*ibid.*). See 21 U.S.C. (Supp. IV) 853. Thereafter, the district court ordered (Pet. App. A31-A35) that the Indian Lake Park property be seized.

2. Petitioners Jessup and the Westmoreland Recreation Society, Inc., a non-profit corporation of which Jessup was the president and principal shareholder, petitioned to vacate the seizure order, asserting that they had right, title, and interest in the seized property superior to Rockwell's. After a hearing, the district court denied the petition and entered an order of forfeiture (Pet. App. A1-A30). The order directed that Indian Lake Park be sold (*id.* at A28-A29); that the government recover $223,100 of the proceeds of the sale, the amount of illicit funds Rockwell had spent improving the site (*id.* at A29); and that Westmoreland Recreation receive any balance remaining from the sale proceeds (*id.* at A30).

3. Petitioner Jessup took a pro se appeal from the order of forfeiture; Westmoreland Recreation did not appeal. The court of appeals then affirmed the forfeiture order as to Jessup, since Jessup had no interest in the forfeited property as an individual (Pet. App. B2). Contrary to Jessup's request, the court declined (*id.* at B2-B3) to construe his notice of appeal as one filed by Westmoreland Recreation, which did have an interest in the property, since Federal Rule of Appellate Procedure 3(c) requires that a notice of appeal "shall specify the party or parties taking the appeal." See *Torres* v. *Oakland Scavenger Co.*, No. 86-1845 (June 24, 1988).

ARGUMENT

Petitioners contend (Pet. 21) that the court of appeals erred in refusing to view petitioner Jessup's filing as a notice of appeal by Westmoreland Recreation.

1. The court of appeals was correct in dismissing Westmoreland Recreation's "purported appeal" (Pet. App. B3). As this Court held in *Torres*, slip op. 2-3, "[t]he failure to name a party in a notice of appeal [as required by Fed. R. App. P. 3(c)] * * * constitutes a failure of that party to appeal." Such a failure "is more than [an] excusable 'informality,' " it is a jurisdictional defect that means the unnamed party is not before the court. *Torres*, slip op. 3, 6. Thus, like the *Torres* plaintiff's argument that the typographical error omitting his name from the notice of appeal was harmless error, petitioners' argument that the failure to comply with Rule 3(c) should be excused because it did not cause confusion to the court or to the government (Pet. App. 21-23), or because both parties briefed the forfeiture issue on the merits (*id.* at 22-23), "misunderstands the nature of a jurisdictional requirement" (*Torres*, slip op. 5 n.3). Although a court may suspend the provisions of other rules of procedure "for * * * good cause shown" (Fed. R. App. P. 2), a court cannot excuse noncompliance with the specificity requirement of Fed. R. App. P. 3(c) because, like other requirements of that rule and Fed. R. App. P. 4, that requirement defines the court's "jurisdictional threshold" (slip op. 3). See *Torres*, slip op. 5 n.3 ("a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court").

2. *Houston* v. *Lack*, No. 87-5428 (June 24, 1988), and *Foman* v. *Davis*, 371 U.S. 178 (1962), do not provide a means of avoiding the jurisdictional bar to Westmoreland Recreation's appeal. In *Lack*, this Court held that notices of appeal filed by pro se prisoners are not subject

to the general rule that a notice of appeal in a civil case is "filed" when it is received by a court clerk. The Court in *Lack* recognized (slip op. 5) that "[u]nskilled in law, unaided by counsel, and unable to leave the prison, [the pro se prisoner's] control over the processing of his notice necessarily ceases as soon as he hands it over * * * [to] the prison authorities." The Court therefore held that a pro se prisoner's notice of appeal should be deemed filed the moment he or she delivers it to officials within the prison designated to receive prisoners' outgoing mail.

This case is very different from *Lack*. First, this Court in *Lack* held (slip op. 6) that the Rules of Appellate Procedure "are not dispositive" on the question whether a pro se prisoner's notice of appeal is filed when the notice is delivered to the prison authorities or at some later time. See slip op. 5-6 (Fed. R. App. P. 3(a), 4(a)(1) specify required destination but not timing of filing). By contrast, the Rules of Appellate Procedure are definite on the question at issue here, whether the court of appeals had jurisdiction over a litigant not specified in the notice of appeal. See Fed. R. App. P. 3(c) (notice of appeal "shall specify the party or parties taking the appeal"). Second, the decision in *Lack* relied to a considerable extent on the special situation of the pro se prisoner, who, among other things, "has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay" (slip op. 4). Petitioner Jessup can hardly argue that, as a pro se litigant, he had a similar lack of ability to control the identification of the parties to the appeal.[1]

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[1] The same factors differentiate this case from *Fallen* v. *United States*, 378 U.S. 139 (1964), in which this Court held that the date on which a pro se prisoner delivers his criminal notice of appeal to prison authorities is, for procedural purposes, the date of the filing of the appeal.

In *Foman* v. *Davis, supra,* the Court addressed a separate provision of Rule 3(c) that requires a notice of appeal to "designate the judgment, order or part thereof appealed from." The plaintiff in *Foman* had filed two notices of appeal, one that was premature because of motions he had pending before the district court, and a second that failed to designate the underlying dismissal as the judgment being appealed. The court of appeals refused to hear Foman's appeal. This Court reversed, holding that the second notice of appeal was "an effective, although inept, attempt to appeal from the judgment sought to be vacated." 371 U.S. at 181.

As this Court explained in *Torres* (slip op. 5), *Foman* stands for the principle that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." But here, as in *Torres,* petitioners "failed to comply with the specificity requirement of Rule 3(c), even liberally construed" (*ibid.*). Petitioners did not file the functional equivalent of a notice of appeal naming Westmoreland Recreation as a party, however unartfully; Westmoreland Recreation simply was not named.[2]

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[2] Petitioners' reliance on *NAACP* v. *Alabama,* 357 U.S. 449 (1958), is misplaced. The Court held there that the NAACP had standing to assert on behalf of its members a claim that they were constitutionally protected from being compelled by the State to disclose their membership in the Association. The Court reasoned (*id.* at 459) that the principle that parties must rely on constitutional rights personal to themselves is "not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court." Petitioner does not and cannot explain why Westmoreland Recreation's rights could not be vindicated by an appeal taken in its

This Court in *Torres* recognized (slip op. 6) that "construing Rule 3(c) as a jurisdictional prerequisite" could lead to "harsh result[s]." As the Court found there, however, the "implacable" terms of the Rule were "imposed by the legislature and not by the judicial process" (quoting *Schiavone* v. *Fortune,* 477 U.S. 21, 31 (1986)). The court of appeals properly applied *Torres* when it dismissed this appeal. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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own name. Indeed, petitioner elsewhere concedes (Pet. 18) that his failure to take the appeal in the name of Westmoreland Recreation was simply a "mistake."

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